

**Alter Barge Line, Inc. and Pilots Agree Association,  
of the Great Lakes and Rivers Maritime Region  
Membership Group of the International Or-  
ganization of Masters, Mates and Pilots, ILA,  
AFL-CIO.** Case 26-CA-18645

December 14, 2001

**DECISION AND ORDER**

**BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND WALSH**

On July 12, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. In addition, the Respondent filed answering briefs.

On June 29, 2001, the National Labor Relations Board issued a Notice and Invitation to File Briefs, which invited the parties to file supplemental briefs on the impact of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001), on the decision in this case. The General Counsel, the Respondent, and the Charging Party filed supplemental briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

*Rosalind Thomas, Esq.*, for the General Counsel.

*Bart Sisk, Esq.* and *J. Wilson Enton III, Esq.*, of Memphis, Tennessee, for the Respondent.

*Samuel Morris, Esq.*, of Memphis, Tennessee, for the Charging Party.

<sup>1</sup> In *Ingram Barge Co.*, 336 NLRB 1259 (2001), issued this day, we adopted the judge's decision finding that the Respondent's barge pilots were supervisors within the meaning of Sec. 2(11) of the Act. The instant case also presents the issue of the supervisory status of barge pilots, and it was decided by the same judge who decided *Ingram Barge*. The judge correctly recognized the similarity between the two cases, and he relied in part on his prior decision in *Ingram Barge* to conclude that this Respondent's barge pilots were also supervisors. Because we have affirmed the judge's decision in *Ingram Barge* and because the facts of the instant case cannot be meaningfully distinguished from those of *Ingram Barge*, we likewise agree with the judge here that the complaint must be dismissed on the ground that the Respondent's pilots are not statutory employees, but are 2(11) supervisors.

**DECISION**

**STATEMENT OF THE CASE**

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on April 3, 2000, in Memphis, Tennessee. The charge was filed on May 11 and amended on May 19 and 27, 1998. In consideration of the full record including briefs filed by Respondent, Charging Party, and General Counsel, I make the following findings.

Respondent admitted that it is a corporation with an office and place of business in Bettendorf, Iowa, where it is engaged in the business of providing towboat and barge inland waterway transportation services. It admitted that during the 12 months ending October 31, 1998, it purchased and received goods at its Bettendorf facility valued in excess of \$50,000 directly from points outside Iowa; that, during that same 12 months, it derived gross revenues in excess of \$50,000 from the transportation of freight in interstate commerce under arrangements with and as agent for various common carriers, each of which operates between various States; that it has functioned as an essential link in the transportation of freight in interstate commerce and during that same 12 months it performed services valued in excess of \$50,000 in States other than Iowa. Respondent admitted that it is an employer engaged in commerce as defined in the Act.

Respondent denied that Charging Party (Pilots Agree) has been a labor organization at material times. Respondent contended that the captains and pilots involved in the organization and activities of the Charging Party were supervisors and, since Charging Party represented some supervisors, it does not qualify as a labor organization. However, Charging Party requested recognition as representative of towboat personnel. There is no dispute but that some of the towboat personnel including deck hands were not supervisors. Unlike the situation involving guards, the inclusions of some supervisors in an organization does not disqualify that organization from representing non-supervisors nor is it disqualifying for a labor organization to represent some supervisors while representing employees. On that basis I am convinced that Charging Party was a labor organization at material times.

The unfair labor practice allegations include violations of Section 8(a)(1) and (3). The complaint alleged that Respondent discharged pilots because of Pilots Agree's strike and that Respondent unlawfully questioned and threatened pilots York and McReynolds. All those issues are dependent on the status of pilots. Respondent contended and General Counsel disputed that pilots are supervisors. This matter presents issues similar to those considered by me in *Ingram Barge Co.*, JD (ATL)-44-99.

**I. THE EVIDENCE**

**A. The Company Meetings**

Pilot James York testified about a meeting in March 1998. Similar meetings were attended by York annually along with land-based management, captains, head mates, engineers, and other pilots. The meeting agenda included what was going on with the Company, employee benefits including "401(k)'s" and insurance and safety programs. The March 1998 meeting was

held at the Alton, Illinois, Holiday Inn. York and Pilot McReynolds were told to meet with management after the overall meeting. Vice President Bruce Cary, President Jeff Goldstein, Port Captain Wayne Williams, and one other gentleman met with York and McReynolds in the conference room. York recalled they “asked us what our feelings was [sic] on the situation.” It was either Jeff Goldstein or Bruce Cary that told York and McReynolds that Alter Barge Line would not employ anyone belonging to the Pilots Agree Association. Goldstein, Respondent’s president, said that he was not going to let Dickey Mathes<sup>1</sup> run his Company. York testified that either Goldstein or Vice President Bruce Cary said that Alter Barge Lines would not employ anyone that belonged to Pilots Agree.

Bruce Cary is Respondent’s vice president of operations. He oversees the port captain, port engineer, barge maintenance and repair, barge claims, insurance claims, overhauls, and major expenditures on vessels. Cary was formerly Respondent’s director of human resources and he was at the marine managers meetings in Alton, Illinois, on February 12 and March 16, 1998. Cary testified that Respondent has held marine meetings annually since at least 1972, and he has participated in those meetings since the late 1980s. Those meetings have always included the captains, pilots, engineers, and mates. Notes were received in evidence regarding the 1994 marine managers’ meeting (R. Exh. 9). The March 16 meeting involved the full day but the afternoon session involved only captains, pilots, and management personnel. Management included Cary, Wayne Williams, Jeff Goldstein, and Larry Dailey. The subject of Pilots Agree came up. The economics of running the vessels were discussed and management distributed some information about costs and expenditures for the boats. Cary stated they were all aware of Pilots Agree. He stated that Respondent’s position was that captains and pilots were managers and therefore Pilots Agree is not a union that Respondent needed to recognize or bargain with.

#### *B. The Pilots*

Respondent operated seven towboats. James York testified that he was pilot on a towboat that was 140-foot long and 42-foot wide with a 5600-horsepower engine. He said that typical barges were either 200- or 195-foot long, by 35-foot wide and a tow may include anywhere from 24, 26, 30, to 40 barges.<sup>2</sup> The pilothouse where wheelhouse personnel operate is 40 feet above the water line.<sup>3</sup> Wheelhouse personnel must be licensed and may be a captain or a pilot. On each vessel the captain and the pilot alternate 6-hour watches with the captain routinely taking the front watch. The front watch extends from 6 a.m. to

noon and from 6 p.m. to midnight. The back watch runs from noon to 6 p.m. and from midnight to 6 a.m. While on duty the captain or pilot, as the case may be, is confined to the wheelhouse. The captain is in overall command of each vessel. However, when the captain is not on duty as is normally the case during the back watch, the pilot is responsible for the safety of the entire crew.

Testimony showed that pilots lack authority to hire, transfer, suspend, lay off, recall, promote, discharge, or adjust grievances. Although James York worked for Respondent for 16 years as pilot, captain, and relief captain, he last worked as a pilot. Tommy Drury was also a pilot when the Union called its strike. Drury and York testified that neither had authority to hire, transfer, suspend, lay off, recall, promote, discharge, or adjust grievances, of other employees. Occasionally the pilot would direct the leadman as to specific work that was needed but the mate, or leadman, would select or assign a particular member of the deck crew for that job. York explained that sometimes discussions would involve discipline. He gave an example of a deckhand walking out on the vessel without a life jacket. The pilot would tell the deckhand that he did not have a life jacket and then tell the mate to be sure and caution the deckhand to put on his life jacket. Tow work received priority. If deckhands were engaged in something like chipping or painting and the pilot directed them to go out on the barges and tighten the tow or check the depth finder, neither the mate nor deckhands would have discretion of refusing that order.

Even though he was a pilot, James York was receiving captain’s pay at the time of his termination. The license held by York (as well as the one held by all pilots and captains), permitted him to function as captain or pilot. York was fully responsible for navigation of the vessel while on duty. Those responsibilities included adapting steerage to weather, wind, and current, and other factors. Coast Guard regulations required the posting of a proper lookout by sight and hearing. The wheelhouse watch officer had the discretion and was responsible for that posting. York testified that he phoned the mate under those circumstances and the mate actually assigned a specific person as lookout. However, York also admitted that he has occasionally specifically assigned the job of lookout to the mate. The pilot advised either the mate or other employee where the lookout was to be posted (i.e., at the head of the tow, in the wheelhouse or at some other location). York would direct an employee to come off the tow or not to go out on the tow, during dangerous conditions. If he determined that conditions were too dangerous he would normally radio the affected employee or blow a whistle. Occasionally York called a mate or deckhand to check the tow, check lights, or check the sounder (i.e., depth finder). On those occasions the mate had no discretion but to follow York’s direction. Tow work was top priority over work of other types. When making a lock while he was on duty, York would call up the deckhands. The tow is usually 105-foot wide and the locks are only 110-foot wide. Therefore, it was tight and direction was needed from lookouts, especially at the head of the tow. It was sometimes necessary for the pilot to maneuver into the dock and he made that maneuver on the basis of directions he received from the lookouts. Additionally, in making a lock the mate and deck-

<sup>1</sup> Dickey Mathes is the Pilots Agree president.

<sup>2</sup> James York testified that the tows were usually 105-foot wide. In that case the tow would involve three barges in width. As shown herein each barge is 35-foot wide. If the tow included 24 barges, the length of the entire vessel would include the towboat, and 8 barges in length. If the barges were the smallest ones listed by York (195-foot long), the total length would be 1560 feet plus the length of the towboat (140 feet). If the vessel included 40 of the 200-foot barges, the length of the tow would be 2800 feet plus the length of the towboat (i.e., a total of 2940 feet).

<sup>3</sup> Oftentimes I refer to the entire unit of towboat and barges as the vessel.

hands may have to catch or release a line<sup>4</sup> but that was done only at the direction of the pilot. York admitted that he responded to a NLRB questionnaire, that he would report unsatisfactory employee performance or improper conduct to a superior and that he would recommend correcting the situation. He has recommended employees for the steersman program where an employee is permitted to operate the wheel under the direct supervision of the captain or the pilot.

Tommy Drury worked for Respondent for 10 or 11 years. He was terminated on April 4, 1998. At that time he was a pilot on the same vessel as James York. He and York relieved each other every 30 days. Drury had been a pilot from 3 to 5 years at the time of his termination. There was no one with authority to direct Drury on duty at the times he was on watch. The captain was off watch at those times. While on watch Drury had the responsibility for the safe navigation of the vessel. Drury's testimony was in accord with that of James York except Drury, as opposed to York, recalled that the station bill listed the pilot as second in command in emergency conditions.

Ervin Dailey worked for Respondent as a pilot. Dailey worked as pilot on the towboat "Phyllis" for about 40 days before he was terminated. His last day of work was March 27 or 28, 1998. Dailey served as captain for a period during 1997 or 1998. When the captain was off the boat Dailey filled in as captain and served as master of the boat. Dailey testified about the pilot's responsibility to file accident reports. The report would involve an investigation as to what took place, what caused the accident, the weather at the time of the accident and other circumstances.

Respondent oftentimes faxed or phoned changes in work orders to the wheelhouse. It was the pilot's responsibility to follow those orders when he was on duty. James York testified that an example was a new order requiring a vessel headed to New Orleans to drop a barge at Natchez, Mississippi. York testified that if the new order required a realignment of the barges in the tow, he and the mate would sometimes get together and determine how to rearrange the tow. If the mate and pilot did not agree to the rearrangement then the captain would decide the matter.

Respondent called Robert Mann. Mann worked as a relief captain. He worked for Respondent for 17 or 18 years and served as a deckhand, mate, pilot, and captain. He was trained as pilot by James York. The pilot is the highest-ranking person on the back watch. The pilots navigate the vessel and direct the deck crew regarding work on the tow. When the pilot received a change of orders through phone or fax, he would not wake the captain unless there was a problem with the orders. The pilot would see that necessary action was taken during his watch as required by new orders. Administrative duties required by the pilot included filling out the log and the preparation of accident reports for occurrences during his watch. The pilot had authority to direct work of the deck crew on wiring barges in the tow and on correcting tow problems such as a defective sounder, speaker, or navigation lights. The pilot had authority and responsibility to direct crew members including the mate to leave another job and take action to correct problems with the tow, including repair to the sounder, speakers, or navigation lights. It was the pilot's responsibility to post lookouts during his watch. That duty re-

quired discretion by the pilot. He was required to judge whether the situation required a lookout and to take appropriate action including directing the mate or crew member to a particular watch station. Mann testified that he usually posted two lookouts when passing under a railroad bridge. When there was a doubt in his mind regarding clearance under a bridge during high water conditions, Mann always posted a lookout on top of the wheelhouse. Mann testified there are 26 or 27 locks on the Mississippi between Cairo, Illinois, and St. Paul, Minnesota. If the pilot is on watch as the vessel goes through a lock, he is responsible for directing the work of all crew members including the mate, in taking the vessel through the lock. The watch standers are oftentimes directed to advise the pilot as the vessel approaches the lock as to particular distances between positions on the vessel and positions on the lock. The posting and directing work of the watches included directing the taking in and releasing lines from the lock. For example there are several line attachment points on locks called pins, and the pilot directed the mate and crew members to catch a line from particular pins. The pilot was responsible for maintaining the log during his watch. Typically the log included logging in the mileage marker where the vessel is located when the pilot assumed his watch, a report on the weather and anything extraordinary such as damage to a barge during his watch. In case of damage such as rubbing a bridge, the pilot would be responsible for reporting the incident to the Coast Guard and the Company, logging the incident and directing the mate to inspect the barges for possible damage. If there was damage to a vessel the pilot would file a report. If a crew member refused a pilot's orders he was replaced on the watch and questioned after the incident. If that crew member continued to refuse to follow the pilot's orders he was fired. Pilots, as well as captains, may direct crew members to wipe off the fog from the wheelhouse windows. When a tow needs tightening the duty wheelhouse personnel either the captain or the pilot directed a crew member or crew members to tighten the tow.

Robert Groves testified for Respondent. Groves is currently employed as a mate. Groves testified that the pilot is in control of the back watch. The pilot is charged with operating the boat and supervising all the deck hands on the back watch. The mate directed the deckhands in routine maintenance work including painting but if the pilot directed their presence on the tow, the employees were required to follow the pilot's directive. Groves worked with pilots Ervin Dailey and Mike McReynolds. He testified that Dailey had a particular preference for making up a tow and Dailey directed Groves to make up tows with all the double ups on and scissor wires in the couplings.<sup>5</sup>

Wayne Williams is Respondent's port captain. He testified about employees at the bottom of the pay scale. After those employees are on a boat for an extended period he routinely phoned the boat and talked to the wheelhouse person on duty, which was either the captain or the pilot. Williams asked that person what kind of job the employee in question was performing and whether the pilot or captain, as the case may be, recommended that employee for a pay increase. Williams then passed the pilot or captain's recommendation on to the corporate office.

<sup>4</sup> The term line refers to 2-1/2-inch diameter, nylon ropes.

<sup>5</sup> See R. Exh. 7 and Tr. 169.

### C. The Strike

The parties agree that Pilots Agree called a strike against Respondent and other towboat companies on April 4, 1998. Alleged discriminatees York, Dailey, Drury, and McReynolds supported that strike.

### D. The Terminations

There is no dispute regarding efforts to have Respondent recognize Pilots Agree as bargaining unit for its pilots. A number of captains and pilots from Respondent and other tow companies joined together and formed Pilots Agree. As a result of their honoring Pilots Agree's April 4, 1998 strike alleged discriminatees Thomas Drury, Mike McReynolds, Ervin Dailey, and James York were either discharged or presumed quit by Respondent. James York was off work at the time of the strike. After April 4, Wayne Williams phoned York and asked if York was ready to return to work. York replied that he could not go back because he was honoring the Union's strike. Williams said that he was sorry to hear that. York asked if he was fired. Williams replied that he could not tell York at that time but that he would get back to him. York was phoned by Williams and Bruce Cary on April 8 and asked if he was ready to return to work. Again York replied that he was honoring the strike. Cary responded, "[W]ell in other words you're refusing to come back to work." York replied, "[N]o, I'm not refusing to come back to work." Cary told him "well, we're just going to have to tell you you're not—no longer employed by Alter Barge Line."

Pilot Ervin Dailey was also off duty at the time of the Union's strike. His relief on the towboat was alleged discriminatee Mike McReynolds. While off duty Dailey learned that Wayne Williams had phoned and he returned the call. Dailey told Williams that he was not going back to work unless Respondent signed an agreement with Pilots Agree. Williams asked if he quit and Dailey replied no that he was on strike. Williams told Dailey that he was putting him down as quitting.

Tommy Drury stopped the vessel and tied it off at the time announced for the Union's strike. He notified the Coast Guard and Wayne Williams that he had stopped and tied off the vessel. He told Williams he had tied the vessel off because of the strike. Drury later asked Williams if he was being fired and Williams replied that he was. Mike McReynolds did not testify but Respondent agreed that McReynolds was on duty and acted to support the strike.

## II. CONCLUSIONS

### A. Credibility

As shown above, the testimony is in general agreement regarding all material events. There are conflicts as to the extent of pilots' authority. The general tenor of the testimony presented by General Counsel was that each pilot while on duty, was charged with the safety and navigation of the vessel during his watch but he did not directly supervise the work of any employees on the vessel. Instead either the pilot or the captain before the watch started, would direct or suggest to the mate that certain actions were required and the mate would then assume responsibility for accomplishing those tasks even if that required the mate to supervise work of others. The general tenor of the testimony presented by Respondent was that each pilot was charged with the safety and navigation of the vessel while on duty and it was the

pilot's responsibility to see that all jobs were completed which affected those responsibilities. The pilot's duties included supervising the work of all hands that were engaged in tow, safety, and navigation work during the back watch.

I have considered the respective arguments of General Counsel, the Union, and Respondent in making my credibility findings. I have also considered the witnesses' demeanor and the full record.

James York was evasive in cross-examination especially in testimony regarding posting watches. York finally agreed that he did occasionally call a mate to act as lookout. When asked how often that had happened York replied maybe "once a month, maybe twice a month, maybe once a year." York's testimony was in conflict with statements he made during the investigation of the charges. He testified that he normally did not report unsatisfactory performance or improper conduct of a crew member. However, in response to a questionnaire from the region York stated yes to that same question. York then testified that he made no recommendations when he reported unsatisfactory performance or improper conduct. However, in response to the Region's questionnaire York answered that he did make recommendations. Portions of York's testimony seemed unbelievable. For example, James York testified to the effect that he would not directly admonish an employee he saw on the tow without a life jacket. He would call the employee off the tow but instead of disciplining the employee, he would inform the mate and permit the mate to caution the deckhand to wear his life jacket. That testimony appeared to split hairs in an effort to show that the pilot never became involved in employee discipline. It is unrealistic to believe that a pilot would take special precaution not to appear to admonish anyone seen on deck without a life jacket regardless of the circumstances and danger. In view of those matters, his demeanor and the full record, I do not credit the testimony of James York to the extent it conflicts with credited evidence.

I was impressed with the demeanor of Robert Mann and Robert Groves. Additionally, I found the testimony of Mann and Groves more believable in view of the full record. That testimony showed the mate and lead deckhand, were the immediate overseers of routine work by deckhands. However, the overall responsibility for the navigation and safety of the vessel rested with the pilot who was responsible for steerage, locking, and seeing that all the vessel's safety equipment remained in working order. The pilot had the authority according to Mann and Groves to direct employees including the mate and lead deckhand, to break off a job in order to immediately start another job involving navigation or safety of the vessel. I fully credit the testimony of Mann and Groves and to the extent their testimony conflicts, discredit the testimony of York, Drury, and Dailey.

### B. Findings

The underlying issue involves the question of whether pilots are employees as defined in the Act. All the alleged illegal dischargees were pilots but Respondent contends that pilots are supervisors.

In *Ingram Barge Co.*, JD (ATL)-44-99 (1999), I found that the pilots were supervisors. There as here, the employer operated towboats pushing barges on inland rivers. The Act extends certain rights and protection to employees engaged in protected activity. Employee is defined in Section 2(3) of the Act and that

section specifically excludes from the term employee “any individual employed as a supervisor.”

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [See NLRA, Sec. 2(11).]

The 11th Circuit recently considered the question of supervisory status of docking pilots in *Copper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999). There the court stated:

The statutory definition lists the functions of a supervisor in the disjunctive, so Cooper only needs to prove that docking pilots fulfill one of these functions in order to succeed in its claim that pilots are supervisors. See *N.L.R.B. v. Dadco Fashions, Inc.*, 632 F.2d 493, 496 (5th Cir. 1980). As the Supreme Court has noted, three questions must be answered in the affirmative for an employee to be deemed a supervisor under section 2(11): “First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require ‘the use of independent judgment’? Third, does the employee hold the authority in the ‘interest of the employer’?”

The Board has also held that the possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner (*Spentonbush/Red Star Co.*, 319 NLRB 988 (1995)).<sup>6</sup> Here there is a question about the pilots’ authority to “responsibly to direct” employees in their work. The court in *Copper/T Smith, Inc. v. NLRB*, finding that docking pilots were not supervisors stated,

Responsibility is defined as being “answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and is implied by power.” [Case citation omitted.] The words “responsibility to direct” are not weak or jejune but import active vigor and potential vitality.

Unlike the instant situation the docking pilots in *Copper/T Smith, Inc. v. NLRB*, gave directions to the tugboat captain and the tugboat captain, not the docking pilot, was responsible for directing employees in their work. Here, as in *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997), the employees in question served on watches while admitted supervisors were off duty.<sup>7</sup> There the Sixth Circuit applied a three-part test to determine if licensed practical nurses were supervisors. “To be considered a

supervisor, (1) an individual must exercise authority in at least one of the areas listed in the statute, (2) when exercised, that authority must be exercised in the interests of the employer, and (3) the exercise of authority must require the use of independent judgment.”

In *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000), the court found that the purpose of NLRA Section 2(11) was to provide an employer with “a team of employees that (the employer) controls to whom he can delegate the essential supervisory functions that he cannot exercise personally.” Here the employer was represented by the pilot on each tow during the pilot’s watch while the captain was off duty and sometimes asleep.

Respondent operates towboats inland waterways including the Mississippi River. A tow includes the towboat and barges and may be from 1560- to 2940-feet long. Wheelhouse personnel include only captains and pilots and each one is required to hold a license. On each vessel the captain and the pilot alternate 6-hour watches with the captain routinely taking the front watch. The captain is in overall command of each vessel. The testimony is not in dispute but that pilots were charged with the safety and navigation of Respondent’s vessels during their 12 hours of watch time each day.

General Counsel produced testimony that pilots lack authority to hire, transfer, suspend, lay off, recall, promote, discharge, or adjust grievances. However, credited evidence showed that the pilot is the highest-ranking person on the back watch. The pilots navigate the vessels and direct the deck crews’ work related to tow, safety, and navigation. The pilot was authorized to stop other work and transfer deckhands including the mate to work on the tow. When the pilot received a change of orders from Respondent through phone or fax, he would not wake the captain unless there was a problem with the orders. In fact Pilot James York testified that he did not call up the captain a single time in 1998. The pilot would see that necessary action was taken during his watch in accord with both new and outstanding orders from Respondent’s office. The pilot is responsible for maintaining the log during his watch. Typically the log included logging in the mileage marker where the vessel is located when the pilot assumed his watch, a report on the weather, and anything extraordinary such as damage to a barge during his watch. In case of damage on the pilot’s watch such as may occur by rubbing barges against a bridge, the pilot would be responsible for reporting the incident to the Coast Guard and the Company, logging the incident, and directing the mate to inspect the barges for possible damage. If there was damage to a vessel the pilot was required to file a report.

If a crew member refused a pilot’s orders he was replaced on the watch and questioned after the incident. If that crew member continued to refuse to follow the pilot’s orders he was fired.<sup>8</sup>

<sup>6</sup> The supervisory issue has also been considered in a number of recent cases including *Empress Casino*, 204 F.3d 719 (7th Cir. 2000); *General Security Services Corp.*, 326 NLRB 312 (1998); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *Mississippi Power & Light*, 328 NLRB 965 (1999).

<sup>7</sup> However, unlike the instant situation the *Caremore* director of nursing or assistant director of nursing did carry a beeper and was on call at all times.

<sup>8</sup> Relief Captain Robert Mann testified regarding this matter. Mann testified that pilots have the same authority as captains regarding deck personnel during the pilot’s watch. Mann testified that he would replace a deckhand that refused his order while docking and if the deckhand continued to refuse his orders, the deckhand would be fired (Tr. 149, 150).

The pilots directed crew members in wiring barges together. Some pilots used unusual methods and those pilots direct the deck crew on how to wire barges in accord with their particular system. It was the watch standing pilot's responsibility to post lookouts. That duty required discretion by the pilot. He was expected to judge whether the situation required a lookout and to take appropriate action including directing the mate or crew member to a particular watch station. The credited testimony of Robert Mann showed that he usually posted two lookouts when passing under a railroad bridge. When there was a doubt in his mind regarding clearance under a bridge during high water conditions, Mann posted a lookout on top of the wheelhouse. There are 26 or 27 locks on the Mississippi River between Cairo, Illinois, and St. Paul, Minnesota. When a pilot is on watch as the vessel goes through a lock, he is responsible for directing the work of all crew members including the mate, regarding navigating the vessel through the lock. The pilot directs the watch standers to notify the pilot as the vessel approaches the lock as to particular distances between positions on the vessel and positions on the lock. The pilot directs crew members in taking in and releasing lines from the lock. None of the employees including the mate is authorized to take in or release a line from a lock without being ordered to do so by the pilot on watch.

The credited testimony of Mann and Robert Groves proved the pilot is in control of the back watch. Groves worked for Respondent as a mate. He testified in agreement with Mann, that each pilot is charged with operating the boat and supervising all the deckhands on the back watch. The mate directed the deckhands in routine maintenance work including painting but when the pilot directed deckhands to the tow, the employees were required to follow the pilot's directive. Groves worked with pilots Ervin Dailey and Mike McReynolds. He testified that Dailey had a particular preference for making up a tow and Dailey directed Groves to make up tows with all the double ups on and scissor wires in the couplings.

General Counsel pointed out that the Respondent's job evaluation forms provided supervisory duties for the captain and mate but did not make those provisions for the pilot (GC Exhs. 8, 9, and 15). However, the evidence revealed and I find that the crew members routinely engage in two types of work. The mate or leadman directed the general maintenance work of crew members. The crew members also perform work associated with safety and navigation of the tow and the evidence proved that the pilot exercises supervisory authority of that work. When a deckhand was working directly on the vessel in relation to its major objective of moving up and down the river, the mate or leadman worked under the overall supervision of the pilot. Of the two types of work, the deckhands' work relating to tow, safety, and navigation took priority. When the pilot ordered the deck crew to engage in work, those crew members were required to leave any other work and perform work at the pilot's direction.

The Board overruled a Regional Director and found that second and third mates were not supervisors in *Chevron Shipping Co.*, 317 NLRB 379 (1995). *Chevron* operated seagoing oil

tankers and there were similarities between the officers in question and the pilots in this matter. However, unlike the instant situation, the masters (captains) in *Chevron* issued standing orders for the watch standing officers and directed the watch standing officers to summons the master whenever an emergency situation or even a doubtful situation occurred. The Board stated, "We conclude, however, that although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur." Here the situation was different. When asked to number the occasions when he got the captain up in 1998 to deal with any situation, Pilot James York answered "none." As shown above, the credited record proved that pilots did not operate under standing orders from the captain. The orders used to the pilot were the same as those used to the captains and those orders were subject to change during a watch through phone or fax from Respondent's office. Moreover, those orders were of a general nature and referred to such matters as dropping off barges at particular locations. The record illustrated that pilots ran the vessel during their watches without help from anyone on board.

In view of the above and the full record, I am convinced that Respondent's pilots are supervisors. If the applicable test is the one applied by the 11th Circuit in *Copper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999), the applicable questions include

First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority in the "interest of the employer"?

The record shows that pilots routinely assign and responsibly direct employees including mates, in their work. Those assignments and directives require the pilots to exercise independent judgment. For example in ordering deckhands to quit other work and report to the tow for work involving navigation or safety, the pilot must determine that work requires immediate attention. Then in directing the work of the mate or leadman and other deckhands, the pilot must judge how best to apply the skills of those employees to handle the situation at hand. The situations are unpredictable and are oftentimes caused by the weather, the current in the river, river traffic, and other factors. Finally, it is clear that the pilot is acting in the interest of the Respondent in the navigation and safety of Respondent's vessel.

In view of my finding that pilots are supervisors, I find that the alleged 8(a)(1) statements were not made to employees and that the alleged discharges were not employees entitled to protection under Section 8(a)(1) and (3) of the Act.

#### ORDER

I recommend that the complaint be dismissed.